

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL LAMENCA,
JOSEPH SANTOS,
PEDRO MEZA-BUSTAMONTE,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

Nos. 21044-5-6 ✓

Appeal From the United States District Court
For the Southern District of California

APPELLANTS' OPENING BRIEF

FILED

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12 (Formerly Southern Division of the
13 Southern District of California)

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15 I.

16 STATEMENT OF JURISDICTION

17 This is an appeal from judgments of the United States
18 District Court for the Southern District of California,
19 adjudging three appellants guilty of two counts of a two-
20 count indictment. The indictment charged violations of
21 Title 21, United States Code, §176 (a) and Title 18, §2 -
22 Aiding and Abetting. Three appellants were found guilty of
23 count one of the indictment (conspiracy) and count two of the
24 indictment (smuggling marijuana and aiding and abetting) by
25 verdicts filed November 19, 1965 (Clerk's Transcript, p. 10).
26

(References to the Clerk's Transcript hereinafter designated C.T. and references to the Reporter's Transcript hereinafter designated R.T.) Judgment was imposed as to all appellants on January 10, 1966. Appellant, Lamenca was sentenced to prison for a period of 15 years on each count, to run concurrently. Appellant Meza-Bustamonte was sentenced to prison for a period of 10 years on each count one and two, to run concurrently, and appellant Santos was sentenced to prison for a period of 20 years on each count one and two, the sentences to run concurrently. (C.T., p. 11). A timely Notice of Appeal was filed on behalf of Santos on January 13, 1966, as to Lamenca, on January 13, 1966, and as to Meza-Bustamonte, on January 20, 1966. (C.T., pp. 29, 30, 31).

The District Court has jurisdiction pursuant to the provisions of Title 18, U.S.C., §3231. This court has jurisdiction to entertain the instant appeal from a judgment under Sections 1291 and 1294, Title 28, U.S.C., and Rules 37 and 39 of the Federal Rules of Criminal Procedure (Title 18, U.S.C.).

II.

STATEMENT OF THE CASE

An indictment was returned against all three appellants by the Grand Jury for the United States District Court, Southern District of California, which indictment was filed on July 21, 1965. (C.T., pp. 2, 3, 4). Count one charged essentially that appellants and diverse persons to the Grand Jury unknown, conspired to smuggle marijuana into the United States

1 and, in furtherance thereof, one overt act was committed.
2 The overt act charged was that on May 7, 1965, appellant
3 Pedro Meza-Bustamonte entered the United States from Mexico
4 in an automobile containing approximately ninety-five pounds
5 of marijuana. Count two of the indictment charged that on
6 May 7, 1965, Pedro Meza-Bustamonte smuggled ninety-five
7 pounds of marijuana into the United States and appellants
8 Santos and Lamenca aided and abetted, counseled and induced
9 the commission of this offense. (C.T., pp. 2, 3, 4).

10 After pleas of not guilty had been entered, trial
11 commenced as to appellants on November 16, 1965, before the
12 Honorable Fred Kunzel (R.T., p. 3). At the close of the
13 government's case in chief, a motion for acquittal as to the
14 appellants Santos and Lamenca was made and these motions were
15 denied. (R.T., p. 233). After the motion for acquittal had
16 been denied at the close of the government's case and after
17 the appellant Pedro Meza-Bustamonte had testified, counsel
18 for the appellants Santos and Lamenca attempted to obtain the
19 identity of the informant on the ground that he was a material
20 witness to the issue of guilt or innocence. (R.T., p. 329).
21 The court refused to order the disclosure of the identity of
22 the informant. At the close of all of the evidence, motions
23 for acquittal as to appellants Santos and Lamenca were made
24 again and again denied. (R.T., pp. 368, 369). All three
25 appellants were found guilty. (R.T., pp. 412, 413, 414; C.T.,
26 p. 10).

1 As to the defendants Santos and Lamenca, the time for
2 making a motion for a new trial or, in the alternative, a
3 motion for acquittal was extended from five days of the
4 verdict until January 3, 1966. (R.T., p. 417).

5 The motion for new trial was denied on January 10, 1966.
6 (C.T., p. 11). The appellant Meza-Bustamonte was sentenced to
7 ten years on each count to run concurrently. Appellant
8 Lamenca was sentenced to fifteen years on each count and
9 appellant Santos was sentenced to a period of twenty years on
10 each count, the sentences to run concurrently. (C.T., p. 11).

1 III.

2 SPECIFICATION OF ERRORS

3 1. Appellants were prejudiced by the trial court's
4 refusal to require identification of the informant who was
5 a material witness on the issue of guilt or innocence.

6 2. Each of appellants were substantially prejudiced by
7 the erroneous admission of statements obtained in derogation
8 of their rights counsel and their right to remain silent.

9 3. The evidence was insufficient as a matter of law
10 to sustain the connection of two of the appellants.
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1 STATEMENT OF FACTS

2 A. Evidence at Trial Before the Jury.

3 1. Evidence Concerning all the Appellants

4 Customs Inspector Hanson, on May 7, 1965, at about
5 5:40 p.m., searched a Chrysler automobile at the San Ysidro
6 Border Station. (R.T., p. 48). The vehicle entered the
7 United States from Mexico and was being driven by appellant
8 Meza-Bustamonte. (R.T., pp. 47, 48). The search revealed
9 certain packages secreted under the front fenders and right
10 rear door of the vehicle which were ultimately determined to
11 be marijuana. (R.T., pp. 50, 215). The total amount of
12 marijuana was ninety-five pounds. (R.T., p. 51). It was
13 stipulated that the packages, Government's Exhibit No. 1, was
14 taken from the automobile being driven by appellant Meza-
15 Bustamonte and that if a government chemist were called to
16 testify, he would testify that samples taken from Exhibit No.
17 1 contained marijuana. (R.T., p. 215). Hanson testified that
18 the reason for the search was appellant Meza-Bustamonte's (here-
19 after referred to as Meza) unusual nervousness. (R.T., pp.
20 48, 49). However, it was subsequently developed that because
21 of information received from an informant, a look out had been
22 placed at the border for the vehicle. (R.T., pp. 298, 299,
23 300, 302, 303, 315).

24 A green piece of paper, Government's Exhibit No. 2, was
25 found in appellant Meza's watch pocket bearing handwritten
26 figures "666 98 48 Sunset", and "Runi" and "6 2312 Elisa".

1 (R.T., pp., 51, 52).

2 Allegedly taken from appellant Meza's billfold was
3 Government's Exhibit No. 4, a sales slip which contained on
4 the back some printing, "HAILANDERL MOTEL 126 HAILAND AVE.
5 126". (R.T., pp. 56, 57, 360, 361). Appellant Meza denied
6 ever having seen said document before it was shown to him by
7 Agent Gates. (R.T., p. 255).

8 On the same day, May 7, 1965, about 6:10 p.m., Inspector
9 Forster saw appellant Joseph Santos enter the United States
10 from Mexico at San Ysidro Border Station alone driving a 1965
11 Impala automobile containing California license number PGB 125.
12 (R.T., pp. 58, 59). After a brief questioning, Inspector
13 Forster directed appellant Santos to another area for further
14 search and questioning because he appeared unusually nervous.
15 (R.T., p. 60). As in appellant Meza's case it later discovered
16 that a "look out" was placed for the vehicle as the result of
17 information received from the same informant. (R.T., pp. 298,
18 299, 300, 301, 302, 303, 365). Inspector Pitman then searched
19 the vehicle and found a license plate receipt, Government's
20 Exhibit No. 7 underneath the front floor mat. (R.T., pp. 64,
21 65).

22 Appellant Santos also had in his possession Government's
23 Exhibit No. 9, a motel key to the Highlander Motel, Room 126,
24 2051 North Highland Avenue, Hollywood. (R.T., pp. 70, 71, 74,
25 75). A card, Government's Exhibit No. 10, which had written
26 on the back "DU 6-2312" and an installment promissory note were

1 also taken from Santos at the time of the search. (R.T., pp.
2 70, 71, 72).

3 After both appellants Meza and Santos were taken into
4 custody, Agent Gates brought them together and both denied ever
5 having seen each other or ever having had any contact with one
6 another whatsoever. (R.T., pp. 240, 255, 256, 285).

7 About 10:55 p.m. on the evening of May 7, 1965, Investi-
8 gator Rainsberger accompanied by Agent Sutton saw and talked to
9 appellant Lamenca in appellant's room at the Highlander Motel,
10 2051 North Highland Avenue, Hollywood, California. (R.T., p.
11 90). Appellant Lamenca had in his possession at that time
12 \$4,500.00 which allegedly belonged to appellant Santos. (R.T.,
13 p. 91). The agents impounded \$4,000.00, permitting appellant
14 to retain \$500.00. (R.T., pp. 99, 100). Apparently the agents
15 felt that appellant Lamenca had committed no offense for he
16 was not arrested at that time. (R.T., pp 100, 101, 102).

17 New Mexico State Police Patrolman Benavidez, testified
18 that on March 21, 1965, about 2:45 p.m., while on a routine
19 check on U.S. Highway 66, he stopped a westbound 1963 Cadillac,
20 New York license plate NY 212 JS. (R.T., p. 143). In the
21 vehicle were appellant Lamenca and another male. (R.T., p. 144)
22 After being told by appellant Lamenca that the vehicle belonged
23 to appellant Santos, Patrolman Benavidez called Santos in New
24 York and ascertained that the vehicle was being driven to
25 California for resale. (R.T., pp. 145, 146, 147). The motel
26 records of the Hollywood Hills Motel in Hollywood, Government's

1 Exhibit No. 20, indicated that a Lamenca had been registered
2 at the motel from March 22 through April 5, 1965. (R.T., pp.
3 153, 154).

4 Telephone Company and Western Union records revealed that
5 a telegram, Government's Exhibit No. 23, was sent from an
6 unpublished telephone number in New York, registered to appel-
7 lant Santos' wife, addressed to a Mike Lamenca, Halls Motel,
8 Hollywood, California. (R.T., pp. 157-159, 163, 178). The
9 contents of the telegram were two Spanish words "VEN HOY"
10 which translated means, "you come today". (R.T., pp. 163, 166,
11 199, 200). The telegram was signed "Joe". (R.T., p. 164).

12 Appellant Meza testified that prior to his arrest he had
13 never seen or heard of nor had any contact with appellant
14 Santos. (R.T., pp. 240, 255, 256, 285-287). The first time
15 he had ever seen or heard of appellant Lamenca was on November
16 2, 1965, in Court. (R.T., p. 285). Meza denied knowing
17 Patricio Becerra. (R.T., p. 293). Meza further denied any
18 knowledge that his vehicle contained marijuana at the time of
19 his arrest. (R.T., pp. 244, 283). That he first saw the
20 Chrysler minutes before his arrest at a point three blocks
21 from the Border. (R.T., p. 276).

22 Appellants Santos and Lamenca did not testify before the
23 jury.

24 Evidence as to Santos only.

25 Agent Gates was permitted to relate, over the objections
26 of counsel for Santos and Lamenca, that after Santos' apprehen-
sion that he was interviewed and in substance related that he

1 and Lamenca had come from New York City to the west coast to
2 go to Tijuana to get the license plate back of a 1963 Cadillac
3 automobile he had sold in New York City to a Mexican. He
4 wanted the plates back because the plate was issued in his
5 name. At first Santos denied that Lamenca had gone to Tijuana
6 with him but after Santos was informed that it was known that
7 Lamenca had registered with him at the same motel, Santos
8 stated Lamenca had gone to Tijuana with him.

9 Gates further related that after he told Santos that two
10 items had been found on Meza, a telephone number which was the
11 same as one written on the back of a business card possessed
12 by Santos, and a slip of paper which contained the name and
13 address of the same motel for which Santos possessed a key,
14 Santos then stated, "The damage is done". (R.T., pp. 70-79).

15 Agent Murphy, over the objection of Santos' counsel, was
16 permitted to relate that in a conversation he had in New York
17 with Santos on May 18, 1965, he related that on March 22, 1965,
18 he had sold his 1963 Cadillac for \$4,000.00 to a Mexican male.
19 Santos further stated that after the sale the Mexican drove
20 off with the car to Tijuana, with the New York State plates
21 still affixed to the vehicle. (R.T., pp. 108-109). Agent
22 Murphy related out of the hearing of the jury, that he knew
23 that Santos had retained an attorney in San Diego. (R.T., pp.
24 11, 29).

25 Evidence as to Lamenca only.

26 Over objection of counsel for Santos, Agent Murphy was

1 permitted to relate a conversation he had with Lamenca on
2 July 22, 1965, at Lamenca's home in New Jersey at the time he
3 arrested Lamenca. Murphy related that Lamenca stated that
4 Santos had paid his fare to Los Angeles on the May 1965 flight.
5 Santos gave him \$4,500.00 to hold, and subsequently customs
6 officers appeared at his motel and had impounded \$4,000.00
7 after permitting him to retain \$500.00 to return home from
8 California. (R.T., pp. 111, 112).

9 B. Matters and Evidence Presented Outside the Hearing of
10 the Jury.

11 1. Counsel for Santos and Lamenca objected to the Government
12 mentioning in its opening statement, certain conversations
13 government officers had with the two aforementioned appellants
14 on the ground that said conversations would be prejudicial in
15 the event a corpus delecti were not established and on the
16 further ground that there had been no effective waiver of
17 counsel at the time the conversations took place. (R.T., pp.
18 5, 6, 7, 8, 12, 13, 14, 32).

19 On May 18, 1965, Agent Murphy, conversed with Santos at
20 his place of business in the Bronx. (R.T., p. 10). During the
21 conversation Santos advised Murphy that he had an attorney in
22 San Diego but none in New York. (R.T., p. 11). After advising
23 Santos that he thought that Santos should have an attorney in
24 New York, Agent Murphy proceeded to converse with Santos con-
25 cerning the 1963 Cadillac transaction. (R.T., p. 11). See
26 also Agent Murphy's testimony before the jury. (R.T., pp. 108-

109, Inc.).

2 Murphy related that on the day he arrested Lamenca he
3 conversed with him in Lamenca's bedroom. (R.T., pp. 15, 17,
4 19). At the time that Murphy first conversed with Lamenca
5 he knew that Lamenca did not have an attorney, but was
6 trying to get Lamenca's cooperation. (R.T., p. 15). The
7 conversation was in English, although Lamenca's English is not
8 fluent and Murphy does not speak Spanish. (R.T., p. 22).

9 Murphy further related, that after the usual warnings of his
10 right to counsel, the right against self-incrimination, right
11 to an attorney, he arrested Lamenca and this is when Lamenca
12 made the statements about the trip to California in May with
13 Santos and the money belonging to Santos. (R.T., pp. 16, 18).

14 Counsel's objections were overruled. (R.T., pp. 15, 33).
15 The court stated in substance that if the conversations were
16 admissible as evidence they could be referred to by the
17 government in its opening statement. (R.T., p. 33). The court
18 further related that as far as it had been able to ascertain,
19 no Federal Court has gone as far as the California Court on
20 this question of the admissibility of statements made in the
21 absence of counsel and that under the present state of the
22 law, he would have to overrule the objection as to Lamenca
23 also. (R.T., pp. 33).

24 2. Revealing the Identity of the Informant

25 After appellant Meza terminated testifying on his own
26 behalf, the question of the informant was taken up out of the

1 presence of the jury. In the interest of time, government's
2 attorney, Phillip W. Johnson waived any hearsay objection as
3 to Agent Gates, stating what information he had received, but
4 did not waive the objection to the question that would tend
5 to reveal the identity of the informant. (R.T., p. 298).

6 Customs Agent, Gates was then called as a witness. Agent
7 Gates related that the information that was received in
8 connection with this case that caused the vehicle of Meza to
9 be stopped was relayed through a customs secretary, Barbara
10 Abrenilla. (R.T., p. 299). Pursuant to the same information
11 furnished the secretary by the informant a "look out" was put
12 out for the automobile that was subsequently found to be driven
13 by appellant Santos. (R.T., p. 299). The information was
14 received on May 7, 1965, about 4:00 p.m. R.T., p. 300).

15 Over the government's objection, Gates related that he
16 received information that the '55 Chrysler had driven in a
17 garage which belongs to Patricio Becerra in Tijuana. (R.T., p.
18 301, 302). The garage is located in the area of La Mesa which
19 is approximately five to seven miles east of downtown Tijuana
20 and the Border. (R.T., p. 302). The information alleged that
21 the residence where the garage is located belongs to Patricio
22 Becerra. (R.T., p. 302). Gates received information that
23 Patricio was seen to enter the garage with several gunnysacks in
24 his possession and the garage door was closed. (R.T., p. 302).
25 Several other Latin persons were in the garage with Patricio.
26 (R.T., p. 303).

1 With reference to the information received by the Customs
2 Agency and Gates concerning the Chevrolet automobile driven by
3 Santos at the time of his arrest, Gates related that the
4 information he received was that two men had arrived at the
5 same garage in a white Chevrolet bearing California license
6 number PGB 125; that the garage doors had been opened and the
7 vehicle taken into the garage. (R.T., p. 303). The vehicle
8 stayed in the garage approximately five minutes and then was
9 driven out of the garage and parked on the street and that then
10 the Chrysler was put into the garage immediately thereafter.
11 (R.T., p. 303). The information received also indicated that
12 after the Chevrolet was driven and parked on the street, the
13 people in the Chevrolet remained in the area. (R.T., p. 303).

14 Shortly after the arrest of the two men, Meza and Santos,
15 Gates received further information directly from the informant.
16 (R.T., p. 304). Gates related that he knew the identity of the
17 informant. (R.T., p. 304).

18 Santos and Lamenca, through their respective counsel then
19 asked Agent Gates who the informant was who gave him the in-
20 formation directly after the arrest or the person who relayed
21 the information to the secretary. (R.T., pp. 305, 328, 329).
22 The demand for the identity of the informant who was an eye
23 witness to the loading of the Chrysler and who saw the Chevrolet
24 along with several men of Latin extraction at the alleged
25 garage belonging to Patricio Becerra, was denied by the court.
26 (R.T., p. 305-328, Inc.). The court refused to order.

1 disclosure. (R.T., pp. 328, 329).

2 The court then stated that at this posture it would
3 not require the government to reveal the identity of the
4 informant without hearing from the appellant Santos so that
5 it could determine whether or not the informant might assist in
6 his defense. (R.T., p. 305). The court reiterated that it
7 would not grant the request until he heard from the appellant
8 Santos. (R.T., p. 307).

9 Santos, through his counsel, pointed out to the court that
10 because of the court's ruling the appellant was now placed in
11 a position of being forced to give up his right against self-
12 incrimination, even though he was to testify out of the presence
13 of the jury, particularly in view of the fact that he felt the
14 materiality of the informer's testimony had been shown. Counsel
15 further stated that since the Court had indicated that it
16 would not grant the demand until it heard from Santos, the
17 appellant Santos would take the stand out of the presence of
18 the jury to attempt to establish in the court's mind the mater-
19 iality of the informer. (R.T., pp. 309, 310).

20 Joseph Santos was then called to testify out of the
21 presence of the jury. He related that on May 7, 1965, he had
22 talked to Patricio Becerra in Tijuana in connection with the
23 sale and registration of a car. (R.T., pp. 312, 313). He
24 talked to Becerra outside a new house that apparently was unoccu-
25 pied. (R.T., p. 313). All during his conversation with Becerra
26 his vehicle was parked on the street. (R.T., p. 314).

1 Santos related that while discussing the matter of the automo-
2 bile registration with Becerra he never saw a '55 Chrysler
3 automobile at anytime nor did he see a garage at that location.
4 (R.T., p. 315, 316). He described the premises as a house with
5 an iron fence all around it. (R.T., p. 315). A welding truck
6 and two automobiles, a Plymouth and an Oldsmobile were also in
7 the immediate vicinity. (R.T., p. 315).

8 Santos further related that he received \$4,000.00 in New
9 York when he sold the Cadillac automobile to a man he thought
10 to be Patricio Becerra. (R.T., p. 318). It later turned out
11 that the purchaser was the nephew of Patricio Becerra. (R.T.,
12 pp. 318, 319). Santos stated that when the automobile was
13 sold it was agreed that Lamenca would drive it to Los Angeles
14 and upon arrival there the purchaser would straighten out the
15 registration and give Lamenca the license plates so that
16 Lamenca could return with them to New York to give to Santos.
17 (R.T., p. 319). It was agreed that if the purchaser could not
18 register the car in his name, the money would be refunded.
19 (R.T., p. 319). His sole purpose for the trip and talk with
20 Becerra was to straighten out the matter of registration.
21 (R.T., p. 318). The court refused to order disclosure. (R.T.,
22 p. 328, 329).

23 3. Motion for Mistrial

24 After the question of the informant had been argued and
25 determined, out of the presence of the jury, Agent Hanson was
26 called to testify as a rebuttal witness before the jury.

1 (R.T., p. 360). Previously in the government's case in chief,
2 Hanson had testified that the reason he searched the Chrysler
3 was because appellant Meza appeared unusually nervous.
4 (R.T., pp. 48, 49). Hanson related on rebuttal that at 7:00
5 o'clock on the day in question he was not aware that appellant
6 Santos had been arrested. (R.T., p. 364). Counsel for Santos
7 then asked, "In other words, you didn't have any knowledge of
8 any purported connection between the two". (R.T., p. 365).
9 Hanson answered, "No sir, excepting the search report-- or the
10 look out." A motion to strike the answer was granted. (R.T.,
11 p. 365). A motion for mistrial on the grounds that the witness
12 had deliberately gone into the question of "look out" was
13 denied. (R.T., p. 368).

A. SUBSTANTIAL PREJUDICE RESULTED TO ALL APPELLANTS ON THE TRIAL COURT'S REFUSAL TO REQUIRE IDENTIFICATION OF THE INFORMANT.

Meza testified that he had no knowledge that there was contraband in the Chrysler automobile in which he was stopped at the Border. He testified in effect, that he had been duped by two men, not Santos nor Lamenca, into driving the car across the Border in exchange for a ride to Los Angeles. Meza fully testified as to how and by whom he was duped. After Meza had testified, but before either appellant Lamenca or Santos had rested, it was developed through Agent Gates that the government had received information from an eye-witness to the loading of the Chrysler, and also information was received that the automobile in which Santos was later arrested was at a residence in the La Mesa area, Tijuana owned by Patricio Becerra. The Chrysler automobile in which later both Meza and the contraband was found was also seen at this residence.

1 The informant also related that he had seen men in the
2 Chevrolet automobile; that he had seen the Chrysler automobile
3 being driven into a garage at this residence where one Patricio
4 Becerra and several Latin persons apparently loaded the vehicle
5 with contraband. At this point a request was made to court
6 order the government to disclose the identity of the informant
7 as he was a material eye-witness to a substantial portion of
8 the crimes charged. Counsel was permitted to explain that if
9 Meza's testimony could be corroborated it would show that
10 perhaps that the two men who had prevailed upon him to drive
11 the car were the persons at the residence where the Chrysler
12 was loaded, and that appellant Meza was not there at the time
13 the Chrysler was loaded. This, of course, would corroborate
14 Meza's testimony and could very well have raised a reasonable
15 doubt as to his guilt. Because of the nature of the pleadings
16 weaknesses in the case against Meza causing it to fail would
17 also cause the case against his co-appellants to fail. The
18 court refused to order disclosure. The law appears to be
19 clear that the informant privilege gives away where his identity
20 might be relevant and helpful to the defense of the accused, or
21 might be essential to a fairer determination of the cause.

22 Roviero v. United States, 352 U.S. 53, pp. 60, 61 (1956). The
23 court's refusal to order the disclosure in this case, deprived
24 appellants, and each of them, on the testimony of an eye-witness
25 to events constituting the crimes charged against them. Cor-
26 roborations of the testimony of the appellant Meza or any other

1 weakness of the government's case shown by the eye witness
2 would have resulted in different verdicts by the jury.

3 1. After refusing to order production of the identity of
4 the informant, the court further erred in inviting Santos to
5 testify and to give up his constitutional privilege. It is
6 submitted that there was no burden on any of the appellants
7 to do more than raise a reasonable doubt as to their guilt or
8 to do more than to establish that there was an eye-witness to
9 the crime whose testimony might be helpful to them either by
10 way of corroboration or by further testimony on the merits.
11 Appellants are aware of the decisions of this circuit that hold
12 an informant's identity was not shown to be material on the
13 question of guilt or innocence. Garibay-Garcia v. United
14 States, 262 F.2d 509 (9th Cir., 1966). Alexander v. United
15 States, 362 F.2d 379 (9th Cir., 1966). Cook v. United States,
16 354 F.2d 529 (9th Cir., 1965). Hurst v. United States, 344
17 F.2d 327 (9th Cir., 1965).

18 Appellants concede that there is nothing in the record that
19 shows whether or not the informant was a participant in the
20 offense. It seems that the rule that should govern our case
21 has been well expressed by the California Supreme Court, People
22 v. McShann, 50 Cal.2d 802; P.2d 330 (1958).

23 "Disclosure is not limited to the informer who
24 participates in the crime alleged; The information
25 elicited from an informer may be 'relevant and helpful
26 to the defense of the accused or essential to a fair
determination of a cause' even though the informer was
not a participant. For example, the testimony of an
eye witness-nonparticipant informer that would vindicate

1 the innocence of the accused and essential to a fair
2 determination of the cause.

3 "Disclosure is frequently a problem in such cases
4 as the present one involving violations of the narcotics
5 laws, when the so-called informer is also a material
6 witness on the issue of guilt. A mere informer has a
7 limited role. 'When such a person is truly an informant
8 he simply points the finger of suspicion toward a person
9 who has violated the law. He puts the wheels in motion
10 which cause the defendant to be suspected and perhaps
11 arrested, but he plays no part in the criminal act with
12 which the defendant is later charged.' (People v.
13 Lawrence, supra, 149 Cal. App. 2d at 450). His identity
14 is ordinarily not necessary to the defendant's case,
15 and the privilege against disclosure properly applies.
16 When it appears from the evidence, however, that the
17 informer is also a material witness on the issue of
18 guilt, his identity is relevant and may be helpful to
19 the defendant. Nondisclosure would deprive him of a
20 fair trial. Thus, when it appears from the evidence
21 that the informer is a material witness on the issue
22 of guilt and the accused seeks disclosure on cross-
23 examination, the People must either disclose his
24 identity or incur a dismissal. (See Roviaro v.
25 United States, supra, 353 U.S. at 61)."

26 50 C.2d at page 808.

2. The prejudice that resulted from the failure to order
the disclosure of the identity of the informant was then com-
pounded when the trial court refused to grant a mistrial.

A Customs Agent, in rebuttal, brought before the jury
that there was a "look-out" purporting to connect Santos and
Meza. Thus, as often happens, when the jury is removed from
the courtroom, but the witnesses remain, a witness will later
inject before the jury the matters that the court so carefully
kept from them.

Thus, appellants' having been deprived of the opportunity
to use the testimony of the eye-witness for their benefit,
were saddled with the burden of having the jury believe that

1 the government may have had prior knowledge of some criminal
2 partnership between two of the appellants.

3 Not being permitted to examine reports relating to the
4 informant, and not knowing his identity appellants were unable
5 to even attack the veracity of the source of the "look-out".
6 Thereby appellants were doubly prejudiced by the failure of the
7 court to grant the motion for a mistrial or to compel identi-
8 fication of the informant.

V.
ARGUMENT

APPELLANTS WERE PREJUDICED BY THE ADMISSION OF THEIR STATEMENTS WHERE SUCH STATEMENTS WERE OBTAINED WITHOUT A SHOWING OF AN INTELLIGENT WAIVER OF COUNSEL

1. Appellant Meza-Bustamante

At the time Meza was stopped by the authorities he was a prime suspect, his car was the subject of a "look-out" and the contraband was found in his car and he had been placed in custody. The government was then permitted to impeach Meza from his conversations with Customs Agent Hanson. Meza spoke only Spanish but no evidence was offered to show that he was ever advised of his rights either in Spanish or English prior to his questioning.

2. Appellant Lamencia

Lamencia was arrested July 22, 1965; it was stated that the officer who questioned him spoke no Spanish, and advised him of his rights did so in English. Lamencia spoke poor English. There was no affirmative showing of any intelligent waiver of counsel.

3. Appellant Santos

Conversations were admitted against Santos, although he was represented by counsel, that were obtained without the consent of counsel and in counsel's absence.

Agent Murphy claimed that he went to see Santos only to obtain the registration slip on a Volkswagon seized for forfeiture in connection with this case and that Santos insisted on talking about other aspects of the case. Murphy inadvertently revealed the true nature of his visit and the extent of his

1 interest in the following testimony:

2 "I couldn't get any more details out of him as to
3 why a man from Tijuana would come all the way..." (R.T.,
4 p. 134). Although Murphy knew Santos had been indicted and
5 that Santos had counsel, no attempt was made to contact counsel.
6 Further no attempt was made to obtain an interpreter to
7 determine whether or not Santos knowingly wished to waive his
8 constitutional rights.

9 Each of the appellants spoke Spanish; all required the
10 use of an intepreter at the trial.. There was nothing to
11 indicate that any of the appellants were well educated or had
12 ever studied law. The conversation complained of were obtained
13 after each was a prime suspect of the crimes charged. No
14 evidence was ever offered to show that they ever knowingly,
15 waived their constitutional right to remain silent or their
16 right to counsel after a full disclosure of these rights in
17 Spanish. Crooker v. California, 357 U.S. 433; Spano v. New
18 York, 360 U.S. 315; Massiah v. United States, 377 U. S. 201;
19 Escobedo v. Illinois, 378 U.S. 478; Peo. v. Dorado, 62 Cal. 2d
20 338.

1 THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW
2 TO SUSTAIN THE CONVICTION OF APPELLANT LAMENCA

3 Evidence presented for consideration by the trier of
4 fact was set forth separately in the statement of facts.
5 Excluding all inadmissible statements, either allegedly made
6 by Lamencia or the other two appellants, the sum total of the
7 matters actually presented to the jury established only the
8 following: A vehicle being driven by appellant Meza entered
9 the United States on May 7, 1965, about 5:40 p.m. A subse-
10 quent search of the vehicle revealed about 95 pounds of mari-
11 juana on the person of appellant Meza, allegedly, there was
12 found a piece of paper which purportedly contained the name,
13 room number and address of the motel where later on that
14 same evening custom's agents interviewed Lamencia.

15 About half an hour after appellant Meza was stopped and
16 searched, appellant Santos was taken into custody at the Border
17 at San Ysidro, California while entering the United States in
18 a vehicle from Mexico. In appellant Santos' possession a key
19 to the motel room where appellant Lamencia was interviewed was
20 found.

21 At the time appellant Lamencia was interviewed by the
22 agents at the motel room he possessed \$4,500.00 which allegedly
23 belonged to appellant Santos.

24 Other than the foregoing, there was absolutely nothing
25 upon which the trier of fact could have concluded beyond a
26 reasonable doubt that appellant was guilty of the offenses of

1 which he was convicted. There was absolutely no testimony
2 concerning furtive conduct, false exculpatory statements, pre-
3 vious contact with or knowledge of marijuana, or any of the
4 matters ordinarily relied upon by the government. In addition,
5 there was absolutely nothing to link the appellant with the
6 automobile containing the contraband or appellant Meza, driver
7 of the vehicle in which the contraband was found. Appellant
8 Meza emphatically denied ever knowing, hearing or seeing
9 appellant Lamencia prior to the date they appeared in court on
10 November 2, 1965. Appellant Lamencia was seen some 125 miles
11 away from the border on the day in question and was apparently
12 released by the agents on the basis that he had committed no
13 offense. There was no evidence, whatsoever, indicating that
14 Lamencia had been in Mexico on the day in question.

15 Compare this case with the recent case of Diaz-Rosendo
16 v. United States, 364 F.2d, 941 (9th Cir., 1966), in which
17 this court held, as to appellant Marrero-Perez, that the
18 evidence was insufficient to sustain the conviction as a matter
19 of law. The evidence against Marrero-Perez was much stronger
20 than that presented against appellant Lamencia.

21 A fortiori the evidence as to appellant Lamencia wholly
22 fails to sustain the conviction.

23 "There is, of course, evidence of an intimate
24 personal relationship between William and Josephine,
25 who handled the heroin in question. But guilt may
26 not be inferred from mere association. See Wong
v. United States, (9th Cir.) 145 F. 2d 392, 394".

.....

1 Evans v. United States, 247 F.2d 121, 126 (5th Cir., 1956).

2 "It is no doubt true that the evidence as to
3 William's association with Jowehanne, and as to his
4 own past record of conviction, "gives rise to a
5 suspicion that he conspired with Jowehanne regarding
6 the transaction of March 1, 1937. But a suspicion,
7 however strong, is not proof, and will not serve in
8 lieu of proof. United States v. Jowehanne, supra,
9 245 F.2d 394."

10 Evans v. United States, supra, page 126.

11 "Defendant Stokely's unexplained presence during
12 such a series of suspicious events might well justify
13 grave doubts about her role. But neither association
14 with conspirators nor knowledge that something illegal
15 is going on by themselves constitute proof of partici-
16 pation in a conspiracy. United States v. Falcana, 311
17 U.S. 205, 31 S.Ct. 204, 65 L.Ed. 116 (1934); United
18 States v. Potash, 126 F.2d 84 (C.A.2, 1941) cert. denied,
19 313 U.S. 584, 61 S.Ct. 1138, 65 L.Ed. 1540 (1941)."

20 United States v. Webb, 259 F.2d 558, 562 (6th Cir., 1956).

21 "But it could not be inferred from unexplained casual
22 and unexplained meetings of some of respondents with
23 others who were convicted as conspirators that respondents
24 knew of the conspiracy."

25 United States v. Falcana, 311 U.S. 205, 210 (1934).

26 See also:

1 Plazola v. United States, 231 F.2d 86 (5th Cir., 1956)

2 Sandez v. United States, 230 F.2d 139 (5th Cir., 1956).

3 Ona Hui Jong v. United States, 243 F.2d 391 (9th Cir., 1957).

4 See also: Navola v. United States, 71 F.2d 85 (9th Cir., 1934).

5 Ab Hing Chuan v. United States, 300 F.2d 262, (5th
6 Cir., 1962).

7 Reed v. United States, 250 F.2d 808 (5th Cir., 1956).

8 Taylor v. United States, 180 F.2d 737 (C.A., D.C.,
9 1950).

1 THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW
2 TO SUSTAIN THE CONVICTION OF APPELLANT SANTOS

3 Santos was stopped at the Border 25 minutes after Meza
4 and the contraband had been stopped at the Border. He had in
5 his possession the key to Room 126 of Highlander Motel in
6 Los Angeles, an automobile registration showing the transfer
7 of a vehicle to one Patricio Becerra and a card with the
8 telephone number DU 6-2312.

9 Meza had a sales slip showing the purchase of some items
10 by Patricio Becerra on the face with Hailand Motel 126 on the
11 back. He also had a piece of paper with handwritten numbers
12 "666 98 48 Sunset", the word "Runi" and "62312 Elisa." There
13 was no other connection shown between Santos and Meza or
14 Lamenca and Meza, although past association of Santos and
15 Lamenca were shown.

16 This evidence is insufficient to prove Santos a member of
17 the charged conspiracy and insufficient to sustain guilt. Ong
18 Way Jong v. United States, 245 F.2d 392 (9th Cir., 1957).
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1 VI.

2 CONCLUSION

3 For the foregoing reasons, it is respectfully submitted
4 that the judgment of conviction should be reversed. In the
5 event that the reversal is based on the last point urged,
6 to-wit, insufficiency of the evidence as a matter of law, then
7 the remand to the District Court should be accompanied by
8 instructions by this court to dismiss. See: Diaz-Rosendo v.
9 United States, 364 F.2d 941 (9th Cir., 1966).

10 Respectfully submitted:

11 SHEELA, O'LAUGHLIN, HUGHES & CASTRO

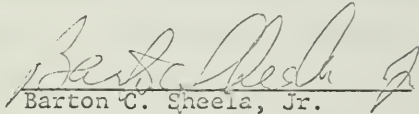
12
13 By Barton C. Sheela, Jr.
14 Barton C. Sheela, Jr., Attorneys
15 for Appellant Santos

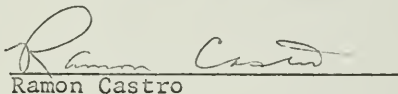
16 SHEELA, O'LAUGHLIN, HUGHES & CASTRO

17
18 By Ramon Castro
19 Ramon Castro, Attorneys for
20 Appellants Lamenca and Meza-Bustamonte

CERTIFICATE

We, Barton C. Sheela, Jr., and Ramon Castro, certify,
in connection with the preparation of this brief, we have
examined Rules 18 and 19 and that, in our opinion, the
foregoing brief is in full compliance with those rules.


Barton C. Sheela, Jr.


Ramon Castro

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO } ss

SANDRA J. WILKES, being first duly sworn, deposes
and says:

That she is a citizen of the United States and a resident
of San Diego County, California; that her business address is
1101 U. S. Grant Hotel, San Diego, California; that she is over
the age of eighteen years, and not a party to the within action.

That on January 13, 1967, she deposited in the
United States mail, San Diego, California, in the within action,

Nos. 21044-5-6 MIGUEL LAMENCA, JOSEPH SANTOS, PEDRO

MEZA-BUSTAMONTE v. UNITED STATES OF AMERICA,

in an envelope bearing the requisite postage, a copy of

APPELLANT'S OPENING BRIEF

addressed to:

Edwin L. Miller, Jr.
United States Attorney
Southern District of California
332 United States Courthouse
325 West "F" Street
San Diego, California 92101

at which place there is a delivery service by United States
mails from said post office.

Sandra J. Wilkes
Sandra J. Wilkes

SUBSCRIBED and SWORN to before me

this 13th day of January, 1967.

Helen K. Teague
Notary Public in and for said State and
County



HELEN K. TEAGUE
NOTARY PUBLIC
Principal Office, San Diego Co. Cal.

